A

Kumar Tamang v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05(M)-173–04 OF 2019
YAACOB MD SAM, RAVINTHRAN AND AHMAD NASFY JJCA
22 JANUARY 2021

C *Criminal Law — Murder — Defence of intoxication — Whether accused had proven that he was so intoxicated at the time of the murder that he did not know what he was doing or did not know that what he did or did not do was wrong — Whether accused should have proven his defence by tendering medical evidence to that effect and not merely by making submissions in court — Whether mere* D *evidence from witnesses that accused was found after the murder to be smelling strongly of alcohol was insufficient for him to rely on the defence of intoxication and insanity under s 85(2)(b) of the Penal Code*

The appellant, a Nepalese national, was convicted and sentenced to death by E the High Court for killing another Nepalese man ('the deceased') in a children's playground one afternoon in September 2016. An eye-witness ('PW3') to the murder testified that she was at the playground with her adopted child when she saw the appellant and the deceased fighting. During the quarrel, she said she saw the appellant throwing a big stone at the deceased's head and the latter F falling to the ground with blood oozing out from his wounds. The appellant then picked up the stone and threw it near a tree. PW3 said she confronted the appellant and asked him why he had assaulted the deceased with the stone. She said the appellant replied: 'let him die' and then walked away. PW3 said she followed the appellant for about two hours and got the help of another person, G PW5, to apprehend the appellant and hand him over to police. In his police report, PW5 said he noticed that both of the appellant's hands were covered with blood and sand and he also gave off a strong smell of alcohol. PW3 said both the appellant and the deceased worked as security guards near her house and used to sit in the playground drinking liquour. The post-mortem report H said the cause of death was 'head injury due to blunt trauma'. The deceased had suffered several injuries to his head and had a high level of alcohol in his blood. The trial judge found PW3 to be a credible witness and her account of the incident corroborative of other independent evidence in the case, including the recovery by the police of the blood-stained stone at the scene of the crime. The I appellant's defence was that he was intoxicated at the time and that he had nothing to do with the deceased's killing. The appellant claimed that he and the deceased had started drinking vodka at a shop for about 1 1/2 hours before they went to the playground where, after a while, he noticed PW3 taking away the deceased's cellphone and the both of them sitting together. He claimed that he

was so intoxicated that he slept off on a bench until police woke him up and took him to where the deceased's dead body was lying. The appellant denied that he had been fighting with the deceased earlier or that PW3 had followed him when he supposedly ran away from the playground after fatally injuring the deceased. The High Court rejected the defence of intoxication because no medical evidence was tendered to show that the appellant was temporarily, or otherwise, insane at the time of the incident by reason of intoxication as required by s 85(2)(b) of the Penal Code. On the contrary, the trial judge found that the appellant's ability to recall PW3 taking away the deceased's cellphone, and he telling her to return it, and the fact that he could remember the deceased and PW3 sitting together while he went off to sleep belied the appellant's claim that he could not remember anything about how the deceased had died. The trial judge concluded that the appellant must have known that his attack on the deceased was severe enough to cause death. In the instant appeal against his conviction and sentence, the appellant contended that the trial judge erred in rejecting his defence of intoxication. At the very least, he said, the trial court should have reduced the charge against him to one of committing culpable homicide not amounting to murder under s 304 of the Penal Code.

Held, unanimously dismissing the appeal and affirming the conviction and sentence:

(1) Whether the appellant was found to be in a state of intoxication after the commission or omission of the act in question could not, by itself, bring his case within s 85(2)(b) of the Penal Code. What was material was that there had to be evidence that at the time when the act or omission occurred, the accused must have been in such a state of intoxication that he was insane in that he did not know that the act or omission was wrong or that he did not know what he was doing. The appellant could have adduced medical evidence to prove his defence. He could not seek to prove it simply by way of submissions in court. The appellant had failed to discharge the burden of showing all these elements. The trial judge was therefore correct in finding that the defence had not raised any reasonable doubt in the prosecution's case and that the prosecution had proved its case beyond reasonable doubt and that the appellant was guilty as charged (see para 36).

(2) The trial judge had found PW3's eye-witness evidence to be credible and consonant with the rest of the independent evidence in this case. He had accepted PW3 as a credible witness who had no motive to lie in court. On the whole, the trial judge had carefully considered all the evidence and carried out a proper evaluation of it both at the end of the prosecution's case as well as at the end of the whole case (see paras 32–33 & 35).

[Bahasa Malaysia summary

Perayu, seroang warganegara Nepal, disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana membunuh seorang lelaki Nepal ('si mati') di taman permainan kanak-kanak pada satu petang pada bulan September 2016. Seorang saksi mata ('PW3') ke atas pembunuhan itu memberi keterangan bahawa dia berada di taman permainan bersama anak angkatnya ketika dia melihat perayu dan si mati bertengkar. Semasa pertengkaran, dia mengatakan bahawa dia melihat perayu melemparkan batu besar ke kepala si mati dan si mati jatuh ke tanah dengan darah mengalir keluar dari luka-lukanya. Perayu kemudian mengambil batu itu dan melemparkannya berhampiran pokok. PW3 mengatakan dia berjumpa perayu dan bertanya mengapa dia menyerang si mati dengan batu itu. Dia mengatakan bahawa perayu menjawab: 'biarkan dia mati' dan kemudian pergi. PW3 mengatakan bahawa dia mengikuti perayu selama kira-kira dua jam dan mendapat bantuan orang lain, PW5, untuk menangkap perayu dan menyerahkannya kepada polis. Dalam laporan polisnya, PW5 mengatakan dia menyedari bahawa kedua-dua tangan perayu diselimuti darah dan pasir dan dia juga berbau alkohol yang kuat. PW3 berkata, perayu dan si mati bekerja sebagai pengawal keselamatan berhampiran rumahnya dan biasa duduk di taman permainan untuk minum minuman keras. Laporan bedah siasat mengatakan bahawa penyebab kematian adalah 'kecederaan kepala kerana trauma tumpul'. Si mati telah mengalami beberapa kecederaan di kepalanya dan mempunyai tahap alkohol yang tinggi dalam darahnya. Hakim perbicaraan mendapati PW3 adalah saksi yang boleh dipercayai dan laporannya mengenai kejadian itu selari dengan bukti bebas yang lain dalam kes tersebut, termasuk perjumpaan batu yang berlumuran darah oleh polis di tempat kejadian. Pembelaan perayu adalah bahawa dia mabuk pada masa itu dan bahawa dia tidak ada kaitan dengan pembunuhan si mati. Perayu mendakwa bahawa dia dan si mati mula minum vodka di sebuah kedai selama kira-kira 1 1/2 jam sebelum mereka pergi ke taman permainan di mana, setelah beberapa lama, dia melihat PW3 mengambil telefon bimbit si mati dan mereka berdua duduk bersama. Dia mendakwa bahawa dia sangat mabuk sehingga dia tidur di bangku simpanan sehingga polis membangunkannya dan membawanya ke tempat mayat si mati terbaring. Perayu menafikan bahawa dia pernah bertengkar dengan si mati sebelumnya atau bahawa PW3 mengikutinya ketika dia sepatutnya melarikan diri dari taman permainan setelah mencederakan si mati. Mahkamah Tinggi menolak pembelaan mabuk kerana tidak ada bukti perubatan yang dikemukakan untuk menunjukkan bahawa perayu adalah sama ada sementara, atau sebaliknya, tidak siuman pada masa kejadian dengan alasan mabuk seperti yang dikehendaki oleh s 85(2)(b) Kanun Keseksaan. Sebaliknya, hakim perbicaraan mendapati bahawa kemampuan perayu untuk mengingat PW3 mengambil telefon bimbit si mati, dan dia menyuruhnya mengembalikannya, dan hakikat bahawa dia dapat mengingati si mati dan PW3 duduk bersama ketika dia pergi tidur adalah tidak selari dengan tuntutan perayu bahawa dia tidak dapat

mengingati apa-apa tentang bagaimana si mati telah meninggal dunia. Hakim perbicaraan menyimpulkan bahawa perayu pasti tahu bahawa serangannya terhadap si mati cukup parah sehingga boleh menyebabkan kematian. Dalam rayuan segera terhadap sabitan dan hukumannya, perayu berpendapat bahawa hakim perbicaraan itu salah dalam menolak pembelaannya kerana mabuk. Sekurang-kurangnya, katanya, mahkamah perbicaraan seharusnya mengurangkan tuduhan terhadapnya atas tuduhan menyebabkan kematian tanpa niat dan bukan merupakan pembunuhan berdasarkan s 304 Kanun Keseksaan.

Diputuskan, secara sebulat suara menolak rayuan dan mengekalkan sabitan dan hukuman:

(1) Sama ada perayu ditemukan dalam keadaan mabuk setelah berlakunya atau tidak tindakan tersebut tidak dapat, dengan sendirinya, membawa kesnya dalam s 85(2)(b) Kanun Keseksaan. Apa yang penting adalah bahawa harus ada bukti bahawa pada saat perbuatan itu terjadi, tertuduh harus berada dalam keadaan mabuk sehingga dia tidak siuman kerana dia tidak tahu bahawa perbuatan itu salah atau dia tidak tahu apa yang dia lakukan. Perayu boleh memberikan bukti perubatan untuk membuktikan pembelaannya. Dia tidak dapat membuktikannya hanya melalui hujahnya di mahkamah. Perayu telah gagal untuk menunjukkan semua elemen tersebut. Oleh itu, hakim perbicaraan benar kerana mendapati pihak pembelaan tidak menimbulkan keraguan yang munasabah dalam kes pendakwaan dan bahawa pihak pendakwaan telah membuktikan kesnya tanpa keraguan yang munasabah dan bahawa perayu bersalah sebagaimana didakwa (lihat perenggan 36)

(2) Hakim perbicaraan mendapati bukti saksi mata PW3 dapat dipercaya dan sesuai dengan bukti bebas lainnya dalam kes ini. Dia telah menerima PW3 sebagai saksi yang boleh dipercayai yang tidak mempunyai motif untuk berbohong di mahkamah. Secara keseluruhan, hakim perbicaraan telah mempertimbangkan dengan teliti semua bukti dan melakukan penilaian yang tepat baik di akhir kes pendakwaan mahupun di akhir keseluruhan kes (lihat perenggan 32–33 & 35).]

Cases referred to

Abdul Aziz bin Mohamed Shariff v PP [2010] 6 MLJ 759; [2010] 5 CLJ 733, FC (refd)
Ahmad Raduan bin Awang Bol v PP [2003] 1 MLJ 372, CA (refd)
Balasundram a/l Paskaran v PP [2012] 4 MLJ 347; [2011] LNS 1086, CA (refd)
Francis Antonysamy v PP [2005] 3 MLJ 389; [2005] 2 CLJ 481, FC (refd)
Lee Thiam Whatt lwn Pendakwa Raya [2019] MLJU 891, CA (refd)
PP v Aldwin Rojas Saz [2019] 6 MLJ 768, CA (refd)
PP v Ramasamy a/l Sebastian [1991] 1 MLJ 75, HC (refd)

A *Tan Chor Jin v PP* [2008] 4 SLR 306; [2008] 4 SLR(R) 306, CA (refd)

Legislation referred to

Penal Code ss 84, 85, 85(2), 85(2)(a), (2)(b), 86, 86(2), 300, 300(c), 302, 304

B

Appeal from: Criminal Trial No 45B-38–05 of 2017 (High Court, Kuala Lumpur)

Sangeet Kaur Deo (Rayveni Asogan with him) (Karpal Singh & Co) for the appellant.

C *Nurul Farhana bt Khalid (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Ahmad Nasfy JCA (delivering judgment of the court):

D

INTRODUCTION

[1] The appellant, Kumar Tamang, a Nepalese national, was convicted and sentenced to death by the High Court at Kuala Lumpur for the following charge:

E

> Bahawa kamu pada 15 September 2016, jam lebih kurang 1.30 petang di Taman Permainan Kanak-Kanak, Jalan Selingsing, dalam Daerah Sentul, Wilayah Persekutuan Kuala Lumpur, telah membunuh SURENDRA PAKHRIN, No. Passport: 07393063. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang dihukum di bawah Seksyen 302 Kanun Keseksaan.

F

[2] Against the conviction and sentence, the appellant appealed to this court. We heard the appeal and had unanimously dismissed the same. We now give our reasons.

G

CASE FOR PROSECUTION

[3] On 15 September 2016, at around 12.30pm, PW3, Indra a/p Anpalakan was at the playground with her adopted child. She identified the photograph of the playground (exh P7(4)) and made a mark 'X' showing where she sat. As she sat there, she saw the appellant and the deceased fighting. She then shouted at them and said 'stop quarrelling' as there are children at the said playground but they continued to fight. She saw the appellant hit the deceased's hand and kicked his legs. She could identify both of them and pointed at the appellant sitting in the dock as well as the deceased as shown in photograph marked exh P7(5) and (7).

H

I

[4] Prior to the date of incident, PW3 saw both of them frequently sat at the children's playground drinking liquor. She knew both of them who work as security guards in front of her house.

[5] When asked to relate the incident, PW3 said the appellant then threw a stone at the deceased's head. The deceased then fell to the ground. The appellant then picked-up the stone and threw it near a tree. She confronted the appellant and asked him why he did that to the deceased. The appellant replied by saying 'let him die'. Thereafter the appellant ran to a street behind the nearby housing area. She followed the appellant for two hours until he was caught by Wong Kim Seng (Ah Yong), PW5, and subsequently arrested by police.

[6] PW3 had identified the huge stone hurled by the appellant on to the deceased's head marked as exh P5A(1)(I). She also could remember the cloth worn by the appellant and the deceased on that day. She said the appellant was wearing a green shirt and a short and the deceased was wearing a white shirt and a short. She also attended the identification parade conducted by Insp Loh Weng Loke (PW11) at Jinjang Police Station and abled to identify the appellant as stated in the identification parade report marked as exh P11.

[7] After handing over the appellant to police, PW5 went to lodge a police report wherein he stated that he noticed that both the appellant's hand had blood stains and sands and that he was drunk with strong smell of alcohol.

[8] PW9, DSP Tan Chek Yang attached to Sentul Police Station was the investigation officer in this case. He testified that on 15 September 2016 he received an instruction from his superior to investigate a murder at Taman Sri Kuching, vide Jinjang Report 19279/16. Upon arrival at the scene at about 5.25pm, he saw the forensic team from Ibu Pejabat Polis Kontinjen Kuala Lumpur and other police personnel were already there. His initial investigation revealed that the deceased was a Nepalese national. The body was lying next to the bench at the said Taman. He had noticed that the deceased had a severe injury to the left and right head believed to have been caused by a blunt object.

[9] PW9 saw a huge stone with blood stains about 2.1 meters from the deceased's body. The said stone was retrieved by the forensic team.

[10] According to PW9, upon his arrival at the scene of crime, he saw the appellant was already apprehended by PW5 and then handed over to the police. PW9 also identified the appellant as Kumar Tamang and the deceased as Surendra Pakhrin, both are Nepalese national.

[11] The post mortem on the deceased was performed by PW4, Dr Siew Sheue Fong, the pathologist. PW4's evidence can be summarised as follows:

(a) the deceased died before 7pm on that day of incident;

(b) injuries number 1, 2, 3, 4 and 5 at p 3 of the post mortem report (exh P12) were injuries to the head of the deceased which ultimately caused the death of the deceased;

(c) injury number 1 is at the right part of the deceased's forehead and right eye area;

(d) injury number 2 is at the left forehead, left eye and a part of the cheek associated with an oblique facture;

(e) injury number 4 is on the left temporal region;

(f) injury number 5 is at the back of the right side of head behind the ear;

(g) injury number 5 is one of the most severe and fatal injury. It is the single most fatal injury.

(h) due to the nature of the injury number 5, doctor would not have been able to save the deceased regardless of when he was brought in for treatment;

(i) but there is some chance to save the deceased or that he may survived if he sustained only other injuries ie injury number 1, 2, 3 and 4 and not injury number 5;

(j) it is difficult to ascertain whether the injuries caused on the right side and left side of the deceased's head were caused by a single person or more than one person; and

(k) there were other injuries sustained by the deceased which may be as a result of some scuffles. However, there are no defensive wounds, and the alcohol level in the deceased's blood was high.

FINDING OF THE TRIAL JUDGE AT THE END OF THE PROSECUTION CASE

[12] At the close of the prosecution case the learned trial judge considered the elements to be proven by the prosecution for the offence of murder. Taking into account the credibility of the witnesses and the evidence of PW3, PW4, PW5 as well as PW9, the learned trial judge found that the prosecution had proved the following:

(a) Surendra Pakhrin a Nepalese national (the deceased) had died;

(b) the deceased died as a result of the injuries inflicted by the act of the appellant; and

(c) the act of the appellant is within the categories stated in s 300 of the Penal Code.

[13] The learned trial judge was satisfied that the deceased died due to the severe injuries. The evidence of PW4, the pathologist, confirmed that the cause of death was 'Head Injury due to Blunt Trauma'. PW4 further testified that the injury could have been caused by a blunt object such as a stone, thus bringing the case under limb (c) of s 300 of the Penal Code which provides:

> Except in the case hereinafter excepted, culpable homicide is murder:
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary cause of nature to cause death.

[14] At the outset, PW3 was the only eye witness at the scene of crime. Her evidence was seriously challenged by the defence counsel. It was submitted that PW3's version is unclear and not consistent and cannot be relied upon by the court.

[15] The learned trial judge was of the opinion that PW3 who was at the scene of the crime had a good look at the appellant and the deceased from where she was seated. She could see clearly the appellant was the one who threw a stone onto the deceased's head and blood was oozing from the wounded head. She saw the deceased fell to the ground and the appellant picked up the stone and threw it near a tree. Thereafter the appellant walked away and she followed him for almost two hours before she could ask PW5 for help. The learned trial judge concluded that PW3 has no motive to lie to court. The court accepted PW3 as witness of credibility. The court observed her demeanour when she broke down upon suggestions by the defence counsel that she was lying.

[16] The learned trial judge was also satisfied that the deceased died due to the head injury. The evidence of PW4 confirmed that the cause of death was 'Head injury due to Blunt Trauma' and that the injury could have been caused by a blunt object such as a stone. PW3 saw the appellant picked up a stone (P5A(1)(i)) and hurled it onto the deceased's head. Exhibit P5A(1)(i) had blood stains when it was retrieved by PW10 (DSP Zuraimi bin Zam Zam). In this regard, there was cogent evidence to show that the severe injuries suffered by the deceased which had caused his death was as a result of the act of the appellant.

[17] It was established from the evidence of PW3 that the appellant had intended to inflict severe injuries on the deceased by throwing the stone on the deceased's head which in the ordinary cause of nature would cause death. In this respect, the trial court was of the view that the severity of the injury

number 5 inflicted by the appellant is fatal in nature and the doctor could not have been able to save the deceased regardless of when he was brought in for treatment.

[18] Having found the prosecution had made out a prima facie case, the learned trial judge then called upon the appellant to enter his defence.

THE DEFENCE

[19] In his evidence given under oath the appellant narrated his defence as follows:

(a) the appellant worked as a security guard at Security Gold since 2016. He stayed at a hostel at Jalan Kuching with 20 other security guards from Nepal;

(b) on the day of the incident, the appellant finished work at 11am and he went back to the hostel at about 11.30am. At about 1.20pm on the same day, the deceased came to his room. The deceased lives in the same hostel and he had known the deceased for about two to three months; and

(c) the deceased told the appellant that he was on leave and had called the appellant out for a drink. Thereafter at about 2pm the appellant, the deceased and another security guard by the name of Ram Tamang left the hostel for a drink. He and the deceased bought a bottle of liquor. The liquor they bought was vodka. They sat at the shop (Kedai makanan dan minuman arak) and started drinking. At about 3.20pm the appellant and the deceased went to the playground. That was the first time he went out with the deceased. After about ten minutes at the playground, one Indian lady (PW3) took away the deceased's handphone. Thereafter the appellant requested her to return the handphone to the deceased. The appellant saw the deceased and PW3 sat together. The appellant then proceeded to the area of the playground and slept on a bench. He testified that at that time he was very drunk and could not realize anything or was unconscious until the police woke him up. They then brought him to the deceased. At that time, he saw PW3 was also there and he also saw the deceased was covered with blood and was no longer alive. He testified repeatedly that he did not throw the stone towards the deceased and caused the death of the deceased.

[20] He disagreed that PW3 followed him when he ran away after allegedly hitting the deceased with a stone. When the police woke him up, he was still in a drunken state. The police only brought him for blood test four to five days after that incident. During the cross-examination, he disagreed that there was a fight between him and the deceased and also disagreed that he and the deceased punched each other.

[21] The appellant also disagreed that PW3 attempted to stop him and the deceased from fighting. He also disagreed that he ran away after hitting the deceased with a huge stone and he had no intention to cause the death of the deceased. He stated that he had no opportunity to reveal his version to the police as he was beaten up by police. Although his cautioned statement was taken in Bahasa Melayu, he is not fluent in the said language.

[22] It is the appellant's defence that he was intoxicated when he was at the playground with the deceased at the material time. In other words, the defence of the accused is that of intoxication under ss 85 and 86 of the Penal Code.

FINDING OF THE TRIAL JUDGE AT THE CONCLUSION THE TRIAL

[23] The learned trial judge had made a specific finding as to the facts and the evidence of the appellant as follows:

(a) the act of hitting the deceased with a huge stone which had inflicted severe injury and resulted in the deceased's death is proved;

(b) the appellant in his defence had stated that he was drunk and that he did not know what he was doing;

(c) to prove intoxication, the appellant must be sent to hospital for medical evaluation. In the instant case no medical report was tendered to show that the appellant was by reason of intoxication, insane, temporarily of otherwise at the time of such act;

(d) the appellant conduct was normal prior and after the incident. In this regard the court found that the appellant's conduct was normal when he stated that he saw PW3 had taken the deceased's handphone and he was able to PW3 to return the handphone to the deceased. He then saw PW3 sat together with the deceased while he went under a tree to lie down. This goes to show the appellant was not drunk. Furthermore, the appellant could describe the incident clearly which a drunken person would be unable to do so. Thus, the appellant had failed in his defence of intoxication and insanity under s 85(2) of the Penal Code;

(e) the evidence of PW3 and PW5 were credible and unshaken as compared to the evidence of the appellant. During the prosecution's case, PW3 in her evidence described what she saw at the children's playground. She saw the appellant taking a huge stone and hitting the deceased. The deceased fell to the ground with face and head covered with blood. She following the appellant for about two hours and then she contacted PW5. PW5 then went to the scene of the crime. He saw the deceased lying on the ground with the face covered with blood. He then searched and apprehended the appellant before contacting the police; and

(f) after evaluating both the prosecution and defence evidence, the learned trial judge had concluded that the appellant knew at the material time that his action is imminently dangerous and that it must in all probability will cause death, or such bodily injury as is likely to cause death and committed such act without any excuse for incurring the risk of causing death or such injury as aforesaid. The evidence adduced strongly supported the presence of an intention to commit murder rather than such action being diminished by intoxication.

[24] Consequently, the learned trial judge found that the prosecution had proved its case beyond reasonable doubt.

THE APPEAL

[25] The learned counsel canvassed before us the following issues:

(a) The accused was intoxicated at the time of the fateful incident. The court must consider the conduct of the accused prior, during and after the alleged incident as testified by him. In this regard, we were urged to particularly pay attention to following that was held in *Balasundram a/l Paskaran v Public Prosecutor* [2012] 4 MLJ 347; [2011] LNS 1086:

> (10) It is a settled law that an inference of intention can be rebutted by evidence of intoxication pursuant to s 86(2) of the Penal Code. In cases where intoxication is in issue, the court must determine whether the accused had the requisite specific intent in the light of his intoxication. The onus of proof where intoxication is raised as a defence is on the accused.

(b) the appellant had successfully raised the defence of intoxication under ss 85(2)(b) and/ or 86(2). It is certainly doubtful as to whether in such intoxicated state, the appellant could be found to have the intention or knowledge to commit the murder of the deceased. As such, the prosecution has failed to prove beyond reasonable doubt that the appellant had intended to cause the death of the deceased;

(c) there is a serious doubt as to whether the appellant caused the injuries which led to the death of the deceased. In this regard, there is serious contradiction in the evidence given by PW3 and PW4 wherein PW3's evidence contradicted the evidence of PW4 who investigated the cause of the death of the deceased and confirmed the cause of his death. The injuries sustained by the deceased as testified by PW4 were inconsistent with PW3's version of event that the deceased was only hit once by the appellants. Such inconsistencies had created a huge gap and doubts in the entire prosecution's case on the major issue whether the appellant inflicted injuries which were sustained by the deceased on his head;

(d) in the circumstances, the learned trial judge made some serious errors in his findings of fact which raised doubt as to whether he fully appreciated the facts in this case. As such the learned trial judge's failure to critically and judiciously appreciate the evidence is serious non-direction amounting to a misdirection which warrants appellate intervention; and

(e) alternatively, the learned trial judge ought to also consider amending the charge against the appellant to a lesser offence of culpable homicide not amounting to murder under s 304 of the Penal Code (see *Ahmad Raduan bin Awang Bol v Public Prosecutor* [2003] 1 MLJ 372).

OUR FINDING

[26] As the main plank of the appellant's arguments rests on the issue of intoxication it is appropriate for us to examine the relevant sections in the Penal Code. Section 85 of the Penal Code reads as follows:

> Intoxication when a defence
>
> (1) Save as provided in this section and in section 86, intoxication shall not constitute a defence to any criminal charge.
>
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and:
>
> (a) The state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> (b) The person charged was by reason of intoxication, insane, temporarily or otherwise, at the time of such act or omission.

Section 86 of the Penal Code provides:

> Effect of defence of intoxication when established
>
> (1) Where the defence under subsection 85(2) is established, then in a case falling under paragraph (a) there of the accused person shall be acquitted and, in a case falling under paragraph (b), the provisions of section 84 of this Code, Section 347 and 348 of the Criminal Procedure Code [Act 593] shall apply.
>
> (2) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise in the absence of which he would not be guilty of the defence.
>
> (3) For the purpose of this and preceding section 'intoxication' shall be deemed to include a state produced by narcotics or drugs.

[27] It is apparent from the language of the above stated provisions that intoxication simpliciter is not a defence. It will only constitute a defence if the accused could bring himself within the purview sub-s (2) of s 85 in that accused

did not know his act or omission is wrong or that he did not know what he was doing. Subsection (2)(a) provides that the state intoxication must have not been self-induced, in that the same was caused without his consent by malicious or negligent act of another party. What then of the cases where the intoxication was a result of one's own action, such as the case of over consumption of alcohol? Section 85(2)(b) seems to suggest that in a case where intoxication was self-induced or self-caused, the person must have reached the state of insanity at the time of the act or omission. s 86(2) of the Penal Code provides another important point: that in determining whether an accused person has the requisite mens rea at the time of the actus reus, the plea of intoxication must be taken into account. This then brings another question as to whether the word 'insane' in s 85(2)(b) would have the same meaning as the defence of unsoundness of mind in s 84 of the Penal Code. The Singapore Court of Appeal in *Tan Chor Jin v Public Prosecutor* [2008] 4 SLR 306; [2008] 4 SLR(R) 306 took the view that 'insanity' and the defence of unsoundness of mind in s 84 are two different concepts. VK Rajah JA, speaking for the court had this to say:

> 24. We are of the view that the two concepts — viz, unsoundness of mind in s 84 on the one hand and insanity by reason of intoxication in s 85(2)(b) on the other — are indeed different. One should not be too astute to attribute statutory superfluousness to Parliament where the use of the word 'insane' in s 85(2)(b) is concerned. Section 85(2)(b) refers to a different basis for exoneration from that afforded by s 84 as the former is grounded on intoxication-induced insanity. In contrast, the unsoundness of mind embraced by s 84 refers to an abnormal state of mind that covers diseases and deficiencies of the mind, both of which are invariably permanent conditions. The reference to 'temporarily or otherwise' in s 85(2)(b) is neither accidental nor superfluous. These words do not refer merely to the temporary symptoms or effects of intoxication. Rather, they refer to an abnormal state of mind that can, inter alia, be transient. In short, s 85(2)(b) reinforces the point that an otherwise normal person can, under the influence of drink or drugs, become so intoxicated that he becomes legally 'insane'. This condition of insanity can be transient, as opposed to the unsoundness of mind envisaged in s 84, which must be permanent.
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> 25. Our view, as just stated in the preceding paragraph, also addresses the question posed at *[20]* above, viz, whether the intoxication-induced insanity referred to in s 85(2)(b) must be permanent or whether it can be transient. In deciding on this particular point, we found it useful to return to the underlying philosophy underpinning the defence of intoxication. It is undoubtedly true that an accused person who commits a crime while suffering from unsoundness of mind or without the requisite mens rea should not be viewed as meriting the same sanction as a person who commits a crime while of sound mind and/or while having the requisite mens rea. The phrase 'temporarily or otherwise' in s 85(2)(b) cannot but mean that even transient episodes of intoxication-induced insanity are to be considered as being embraced by s 85(2)(b). The provision could apply to an accused even if he does not have a prior mental illness or pre- existing mental deficiency. It should not be restricted in its application, as has been suggested (see, eg, the quotation at [22]

above), to an accused suffering from a mental disorder who experiences normalcy between his bouts of illnesses. Why should s 85(2)(b) *be thus restricted given that an accused who lacks the requisite mens rea by reason of s 86(2) is entitled to an acquittal? To be clear, this does not necessarily mean that an accused who succeeds in proving intoxication-induced insanity under* s 85(2)(b) will be completely exonerated and therefore remain at liberty to commit more mischief or crime. An accused who can become insane (whether temporarily or otherwise) under the influence of drink or drugs is a danger to society, and consideration needs to be given to how future recurrent instances of 'insane' homicide by such an accused can be prevented. Indeed, s 86(1) of the Penal Code prescribes that if an accused successfully invokes s 85(2)(b), 'section 84 of this Code [ie, the Penal Code] and sections 314 and 315 of the Criminal Procedure Code shall apply'. In particular, s 315(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) requires the trial court, where it has found that the accused did commit the act in question, to 'order [the accused] to be kept in safe custody in such place and manner as the court thinks fit' after the trial; this provision gives the trial court the option of ordering the accused to be, inter alia, confined in a mental hospital. Given the penal consequences that flow from a successful invocation of s 85(2)(b), it is not surprising that this provision will seldom be invoked by defence counsel if s 86(2) can be successfully relied on. Nevertheless, s 85(2)(b) does have its uses, as illustrated by cases such as Tan Ho Teck ([21] supra), which concerned an accused with a prior history of mental problems (the defence provided by s 85(2)(b) was successfully invoked in that case). As such, notwithstanding the rather limited utility of s 85(2)(b) and the practical reasons militating against its invocation, this provision should not be narrowly interpreted. We prefer to afford statutory defences greater interpretative latitude provided the interpretation adopted dovetails, in the final analysis, with both the letter and the intent of the provisions concerned.

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That decision has been followed by this court in *Public Prosecutor v Aldwin Rojas Saz* [2019] 6 MLJ 768 and *Lee Thiam Whatt lwn Pendakwa Raya* [2019] MLJU 891. That controversy aside, what is critical is that it is for the accused to establish this defence of intoxication in one of the three ways alluded to in *Tan Chor Jin v Public Prosecutor* [2008] 4 SLR 306; [2008] 4 SLR(R) 306. That said too, it is pertinent to observe that the Federal Court in *Abdul Aziz bin Mohamed Shariff v Public Prosecutor* [2010] 6 MLJ 759; [2010] 5 CLJ 733 had occasion to hold as follows:

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To prove intoxication, it is incumbent upon the defence to adduce sufficient evidence to convince the court that this had rendered the accused incapable of forming the necessary intention or knowledge to commit the crime charged, or that 'he was by reason of intoxication insane, temporarily or otherwise, at the time when he committed the crime'.

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[17] The existence of evidence that: (a) the appellant had consumed a large quantity of alcohol or that it was even mixed with toddy, coupled with (b) the presence of a strong smell of alcohol, and (c) the opinions of relatives who are not medically

qualified, that the appellant was drunk is insufficient to constitute a possible defence of intoxication against the preponderance of evidence indicating that he had intended to cause death to the deceased.

[28] From the above and the host of other authorities it is well settled law that the court in examining the plea of intoxication must consider all the available evidence including the accused's conduct prior to, at the time and after the commission of the alleged offence (see *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481; *Abdul Aziz bin Mohamed Shariff v Public Prosecutor* [2010] 6 MLJ 759; [2010] 5 CLJ 733; *Public Prosecutor v Ramasamy a/l Sebastian* [1991] 1 MLJ 75).

[29] Several issues were raised by the appellant contending that the learned trial judge had erred in his decision. We will now deal with these issues.

[30] The learned counsel for the appellant had submitted that the appellant's conduct prior during and after the alleged incident clearly proved that the appellant was so intoxicated and that the appellant was incapable of forming the intention to cause the death of the deceased. The appellant testimony can be gleaned from his evidence which merit consideration as follows:

(a) he was not aware of what happened at the playground from the time he slept at the playground until police woke him up;

(b) he was not conscious and/or not aware at all about his surroundings at the material point of time;

(c) there is no motive or any reason to injure or cause death of the deceased as the deceased was like a brother to him; and

(d) he was still drunk when the police woke him up on the day of the incident.

[31] Learned counsel further submitted that it is established during the prosecution's case that the appellant was under the influence of alcohol at the material point of time. In such circumstances, the prosecution's case corroborates the defence of the appellant that he was so intoxicated that there are doubts as to whether he could have formed the necessary intention to commit the offence alleged against him.

[32] We have carefully examined the reasoning by the learned trial judge vis a vis the evidence as recorded. We are unable to agree with the submission of the learned counsel for the appellant that the evidence of PW3 should be rejected in toto. On the contrary, we are of the view that the learned trial judge did examine the evidence of PW3 and applied the correct judicially accepted test. We are not persuaded by the submission of the learned counsel that

discrepancies between eye witness account (PW3) and medical evidence (PW4) demolishes credibility of prosecution's case. From the evidence recorded, there was ample evidence by PW3 who saw before her very own eyes that it was the appellant who had hurled the stone on to the head of the deceased. PW4, pathologist, testified that on an external examination of the deceased's body, he found that the injuries to head was caused by a blunt object such as stone. In the post mortem report (exh P12) PW4 ruled out there was no significant natural disease found in his body that could have caused or contributed to his death at the particular moment in time. The post mortem report also revealed that the deceased had severe degree of blunt force trauma to the head. Injury No 5 was the single most fatal injury. In the circumstances, we are of the considered view that the above finding was consistent with the evidence of PW3.

[33] We are of the view that the ruling by the learned trial judge at the end of the case for the prosecution was correct. The court accepted PW3 as a credible witness who has no motive to lie in court. The court observed her demeanour when she broke down when learned defence counsel suggested to her that she was lying in court. She viewed the suggestion by the learned defence counsel as an affront to her credibility. In respect of the cause of death, the court was of the view that the head injury inflicted by the accused which according to PW4 was so severe that in the ordinary cause of nature would cause death under s 300(d) of the Penal Code. Upon a maximum evaluation of all the evidence by the prosecution witnesses, the court was of the considered view that the prosecution had succeeded in proving each and every ingredients of the offence and therefore called upon the accused to enter his defence as per the original charge under s 302 of the Penal Code.

[34] In his final judgment at the end of the whole case, the learned trial judge said this, inter alia:

(a) in the instant case the accused had proffered evidence that he was very drunk and he did not realise anything and was unconscious until the police woke him up. The defence had particularised the conduct of the accused soon after the incident occurred viewed from the perspective of the prosecution witnesses namely that the accused and also from the defence version namely the accused's conduct was normal prior to the incident and that the behaviour of the accused was very odd or abnormal in that he went away from the alleged crime scene into a gambling shop to gamble. That the accused never attempted to abscond but was roaming around the crime scene. It is certainly abnormal for anyone who knows what he did, especially causing the death of someone to act in an unusual manner as described by SP3. The conduct of the accused negates the inference that he intended to cause death or injuries that caused the death of the accused;

(b) the court was of the of the view that apart from what SP3 and SP5 stated the accused appeared to be drunk with smell of liquor; the conduct of the accused in lying down as to indicate that he was drunk was insufficient evidence to prove to that the accused was intoxicated when he committed the offence;

(c) the court was of the view that accused had failed in his defence of intoxication and insanity under s 85(2) of the PC as it was not supported by evidence. The court found that the evidence of SP3 and SP5 are credible as compared to the evidence of the accused. The evidence that SP3 had taken the hand-phone of the deceased was not put across during cross-examination of SP3 by the defence. If the evidence of the accused stating that he saw SP3 taking away the handphone of the deceased and was able to say that SP3 had returned the hand-phone to the deceased and then he also saw that SP3 sat together with the deceased while he went under a tree to lie down only goes to show that accused was not drunk. The accused could describe the incident clearly, which a drunken person would be unable to do so;

(d) in the circumstances of the case, after evaluating both the prosecution and defence evidence found that the defence has failed in its defence under s 85(2)(b) of the PC. In the same vein the court found that the accused knew that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death and committed such act without any excuse for incurring the risk of causing death or such injury as aforesaid; and

(e) the court found that the accused has failed to cast any reasonable doubt on the prosecution's case and in the same vein the court held that the prosecution has succeeded in proving its case against the accused beyond reasonable doubt. The court find the accused guilty as charged and sentence the accused to death by hanging.

[35] Again we find that the learned trial judge had carefully considered the evidence adduced and had carried out the proper evaluation at both stages: at the end of the prosecution's case as well as the end of the case.

[36] In so far as the defence of intoxication, as set out in para 31 above, the arguments raised by the learned counsel appears to us to be misconceived. Whilst the accused may, for the sake of argument, be found to be in the state of intoxication after the commission of the act or omission, that in itself cannot bring his case within the s 85(2)(b) of the PC. What is material is that there must be evidence that at the time when the act or omission was to have occurred the accused must be in the state of intoxication and that he was insane in that he did not know that such act or omission was wrong or did not know what he was doing. The accused could have done so by adducing medical

evidence and cannot seek to prove it by way of submission as learned counsel have attempted here. Thus, the accused had failed to discharge the burden of showing all these elements. Therefore, the learned judge was correct when he found that the defence had not raised any reasonable doubt in the prosecution's case and that the prosecution had proved its case beyond reasonable doubt that the appellant was guilty as per charge.

[37] Accordingly for the above reasons, we dismissed the appeal of the appellant against conviction and sentence.

Appeal dismissed; conviction and sentence affirmed.

Reported by Ashok Kumar